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Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

ROBERT PRITIKIN, et al.

Plaintiffs,

vs.

COMERICA BANK, et al.,

Defendants

Case No.: C09 03303 JF

**PLAINTIFFS' OBJECTION TO AND  
MOTION TO STRIKE PORTION OF  
COMERICA'S REPLY BRIEF IN  
SUPPORT OF MOTION TO DISMISS**

Date: October 30, 2009

Time: 9:00 a.m.

Dept.: Honorable Jeremy Fogel

**TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE THAT Plaintiffs Robert Pritikin et al. ("Plaintiffs") hereby object to, and move to strike, all text at page 4, line 25 through page 5, line 8 of Comerica's Reply Brief in Support of Motion to Dismiss (the "Reply Brief").

PRITIKIN v. COMERICA BANK ET. AL.

PLAINTIFFS' OBJECTION TO AND MOTION TO STRIKE PORTION OF COMERICA'S  
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

1 This Objection and Motion is made on the ground that the foregoing text in the Reply  
 2 Brief addresses a legal issue, i.e. whether the allegations of Comerica's wrongful conduct  
 3 alleged in the Complaint meets the pleading requirements of Fed.R.Civ.P. 8(a), which was not  
 4 raised in Comerica's moving papers as a basis for its Motion to Dismiss. As such, said text  
 5 consists of new matter which is inappropriate to raise for the first time in a reply. *See Stewart*  
 6 *v. Wachowski*, 2004 WL 2980783, 10-11 (C.D.Cal. 2004); *Leick v. Hartford Life Insurance*,  
 7 2007 WL 1847635, 1 footnote 1 (E.D. Cal. 2007).

8 The Motion to Dismiss raised the issue of the purported inadequacy of factual  
 9 allegations in the Complaint only with respect to the following three issues:

- 10 (i) Purported failure to allege facts showing the existence of a fiduciary  
 11 relationship between Comerica and Plaintiffs (Motion at 19:8 – 20:15);
- 12 (ii) Purported failure to allege sufficient facts that Comerica had actual knowledge  
 13 of the specific primary wrong that Comerica is alleged to have aided and abetted  
 14 (Motion at 20:16 – 22:7);
- 15 (iii) Purported failure to allege sufficient facts re the existence of an “enterprise”  
 16 under RICO (Motion at 24:12 – 25:17).

17 The Reply Brief, at 4:25 – 5:8, raises a heretofore previously unmentioned issue  
 18 regarding the alleged factual insufficiency of the Complaint: that the Complaint purportedly  
 19 fails to sufficiently allege facts showing the existence of wrongful conduct by Comerica. In an  
 20 attempt to disguise the fact that this issue is new matter, the issue is presented as part of the  
 21 Reply Brief's argument that the notice pleading standard described in *Conley v. Gibson*, 355  
 22 U.S. 41 (“*Conley*”), cited in Plaintiffs' Opposition, has been superseded by the standard set  
 23 forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (“*Twombly*”) and *Ashcroft v.*  
 24 *Iqbal*, \_\_\_ U.S. \_\_\_, 129 D.Ct. 1937 (2009) (“*Iqbal*”). (Reply Brief at 3:4-8.) This is  
 25 disingenuous. Plaintiffs' citation to *Conley* was only relevant to Plaintiffs' Opposition with  
 26 respect to those issues raised in the Motion to Dismiss regarding the sufficiency of the  
 27 Complaint's factual allegations. Plaintiffs are prepared to argue in the hearing on the Motion  
 28 to Dismiss that, as to those issues, i.e. the allegations of Comerica's actual knowledge of the

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PRITIKIN v. COMERICA BANK ET. AL.

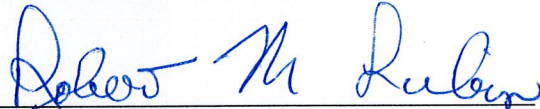
PLAINTIFFS' OBJECTION TO AND MOTION TO STRIKE PORTION OF COMERICA'S  
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1 specific primary wrong, and the allegations of a RICO enterprise, the Complaint meets the new  
2 interpretation of the Rule 8(a) standard as articulated in *Twombly* and *Iqbal*. As to the third  
3 issue raised by the Motion to Dismiss of the sufficiency of the pleading, i.e. the failure to plead  
4 facts showing the existence of a fiduciary relationship between Comerica and Plaintiffs,  
5 Plaintiffs' position—as set forth in Plaintiffs' Opposition—is that no such allegation is  
6 required.

7       However, the issue which Comerica raises for the first time in its Reply Brief, i.e. that  
8 the Complaint fails to sufficiently allege facts showing that Comerica engaged in wrongful  
9 conduct, must be disregarded by the Court as inappropriate new matter.

10  
11 DATED: October 26 2009

12 LAW OFFICE OF ROBERT LUBIN  
13 LAW OFFICE OF KENNETH PRITIKIN

14 

15 ROBERT LUBIN  
16 KENNETH PRITIKIN  
17 JOSEPH CAMENZIND, IV  
18 Attorneys for the Plaintiffs.  
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PRITIKIN v. COMERICA BANK ET. AL.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA (SAN JOSE)

ROBERT PRITIKIN, et al.	)	Case No.: C09 03303 JF
	)	
Plaintiffs,	)	<b>PROOF OF SERVICE</b>
vs.	)	
	)	
COMERICA BANK, et al.,	)	
	)	
Defendants	)	
	)	
	)	
	)	
	)	

1 I am employed in the County of San Mateo. I am over the age of eighteen  
2 years and not a party to the within above-entitled action. My business address is at  
3 The Law Offices of Robert M. Lubin, 177 Bovet Road, Suite 600, San Mateo, CA  
4 94402.

5 On October 26, 2009, I served the foregoing documents which are being  
6 electronically filed described as:

7 **PLAINTIFFS' OBJECTION TO AND MOTION TO STRIKE PORTION OD**  
8 **COMERICA'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**  
9

10 On all other parties and/or their attorney(s) of record to this action by placing a true  
11 copy thereof in a sealed envelop as follows:

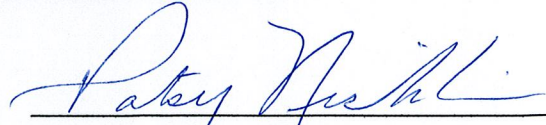
12  
13 Buchalter Nemer  
14 A Professional Corporation  
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17 333 Market Street, 25<sup>th</sup> Floor  
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**Courtesy Copy:**

The Honorable Jeremy Fogel  
United States District Court  
Northern District of California  
Courtroom 3, 5<sup>th</sup> floor  
280 South 1<sup>st</sup> Street  
San Jose, CA 95113  
Rock Solid Legal Services

20 **X (BY OVERNIGHT DELIVERY)** On October 26, 2009, I placed the California  
21 Overnight package for overnight delivery in a box or location regularly  
22 maintained by California Overnight at my office, OR I DELIVERED THE  
23 PACKAGE TO AN AUTHORIZED COURIER OR DRIVER AUTHORIZED BY  
24 California Overnight to receive documents. The package was placed in a  
25 sealed envelop or package designated by California Overnight with delivery  
26 fees paid or provided for, addressed to the person(s) on whom it is to be served  
27 at the address(es) shown above, as last given by that person on any document  
28 filed in the cause; otherwise at that party's place of residence.

Executed on October 26, 2009 at San Mateo, California.

  
\_\_\_\_\_  
Patsy Nicklin